***United States Court of Appeals***

***for the Second Circuit***

# PETITIONER'S REPLY BRIEF

51

# 76-4153

## United States Court of Appeals
## FOR THE SECOND CIRCUIT

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GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

*Petitioners,*

*against*

FEDERAL POWER COMMISSION,

*Respondent,*

POWER AUTHORITY OF THE STATE OF NEW YORK,

*Intervenor.*

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**Petition For Review Of Orders Of Federal Power Commission**

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# REPLY BRIEF FOR PETITIONERS TOWN OF DURHAM AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY

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BARRY H. GARFINKEL
*Attorney For Petitioners*
*Town of Durham, et al.*
Office and P.O. Address:
919 Third Avenue
New York, New York
10022
Tel. (212) 371-6000

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UNITED STATES COURT OF APPEALS
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REPLY BRIEF ON BEHALF OF PETITIONERS TOWN OF DURHAM AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY

This reply by the Durham Petitioners is directed to the Commission's brief on the fees and expenses issue (FPC Br. pp. 60, et seq.) and PASNY's separate brief in Docket No. 76-4153. It seems odd that PASNY should be acting as a spear carrier for the Commission on this matter since the Durham Petitioners' quarrel in this Court is with the Commission--not PASNY.

The Commission argues that notwithstanding the two significant opinions of the Comptroller General (Nos. B-92288 and B-180224, annexed as addenda to Durham's main brief) it lacks "authority" to award fees and expenses to the Durham Petitioners. Secondly, it contends the Durham Petitioners do not "qualify" for an award, even if it had the authority to make one (FPC Br. p. 60). This latter point is presented despite the fact that the Durham Petitioners and their highly qualified experts made substantial contributions to the Commission's ultimate finding on the routing issue and presented the essential opposing point of view. Even PASNY does not have the temerity to suggest that the Durham Petitioners' contributions have not been substantial and meaningful to the agency process.

PASNY, for its part, claims the law of the case doctrine precludes the present review; and, since the Comptroller General's opinions make the fee and expense award a matter of agency discretion, there can be no judicial review thereof (PASNY Br. pp. 5, 8). Understandably, the Commission has not aligned itself with PASNY's farfetched notions of what is reviewable by this Court.

A. The Claimed Lack Of Authority To Grant The Award.

On the one hand, the Commission contends that two opinions of the Comptroller General "are not controlling" (FPC Br. p. 64). On the other, it urges that the rulings are "not relevant" because there was no "arbitrary" denial (FPC Br. p. 65). The Commission is wrong on both counts.

In essence, the Commission is suggesting that the two Comptroller General opinions are a nullity--with no force or effect. This position is belied by the congressional mandate creating the General Accounting Office, which the Comptroller General heads, and by court decisions discussing the authority of that office.

The Comptroller General operates as the chief accounting and auditing officer of the United States. See 31 U.S.C § 1 et seq. In outlining his responsibilities, Congress stated, among other things, that:

> "It is the policy of the Congress in enacting this chapter that--"
>
> * * *
>
> "(d) The auditing for the Government, conducted by the Comptroller General of the United States as an agent of the Congress be directed at determining the extent to which . . . financial transactions have been consummated in accordance with laws, regulations or other legal requirements . . . " 31 U.S.C. § 65(d) (emphasis added).

Congress further specifically provided that:

> "Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement." 31 U.S.C. § 74 (emphasis added).

It is thus clear that the Comptroller General is the congressionally appointed officer charged with responsibility for auditing and passing upon the propriety of payments by the executive branch of the federal government.

As demonstrated in the Durham Petitioners' main brief (pp. 16-18), the Comptroller General has determined that a payment from the Commission's annual lump-sum appropriation to an intervenor in a Commission proceeding would, under certain circumstances, be a proper payment and would be consistent with the "laws, regulations or other legal requirements" governing the spending of money by the Commission.

That the Comptroller General is the sole official empowered to make such a determination was established years ago in Brunswick v. Elliott, 103 F.2d 746 (D.C. Cir. 1939). That case involved the authority of the Secretary of State, acting upon the advice of the Comptroller General, to refuse to pay a retirement

annuity to a retired Foreign Service officer who had obtained other government employment. The retired Foreign Service officer sought injunctive relief ordering, among other things, that the Secretary of State pay him his annuity and that the Comptroller General be enjoined from interfering with or preventing such payment.

The district court denied the injunctive relief requested and dismissed the complaint, and the Court of Appeals affirmed. While the Court of Appeals noted that the substance of the Comptroller General's advice was "not free from reasonable doubt" (103 F.2d at 750), it nonetheless held:

> "There can be no doubt that the matter came within the jurisdiction of the Comptroller General. The Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 31 U.S.C.A. § 1 et seq., provides that . . . the Comptroller General shall, upon request of a proper officer, render a decision such as that which is involved in the present case.
>
> "When the fact of appellant's double compensation came to [the Comptroller General's] attention, therefore, it became his duty to inquire into the matter and answer the question thus presented. Unless the answer to this question was so free from doubt as to require no exercise of judgment or discretion, his duty in the premises was not merely ministerial and an injunction to restrain him from acting as he has done would be improper." Id. at 748-749 (footnotes omitted; emphasis added).*

* The weight to be given a decision of the Comptroller General in a case such as the present one is further demonstrated by the remarks of Circuit Judge Gibbons in Citizens for a Safe Environment v. Atomic Energy Commission, 489 F.2d 1018, 1022 n. 3 (3d Cir. 1974) (dictum) and by the observations in Note, Federal Agency Assistance to Impecunious Intervenors, 88 Harv. L. Rev. 1815, 1827-1828 (1975). See also Comment, Agency Funding of Indigent Public Interest Intervenors in Administrative Proceedings, 6 ELR 10052 (1976).

Similarly, in the present case, the Comptroller General's determination that the Commission may properly expend public funds to pay an intervenor's expenses in a Commission proceeding was not a mere "ministerial" determination, but a matter addressed to the sound discretion of the Comptroller General in his capacity as the chief accounting and auditing officer of the United States. Accordingly, it binds the General Accounting Office, in the course of its audit of the Commission's expenditures, to approve such a payment.

Put in its simplest terms, the Comptroller General's May 10, 1976 opinion (B-180224) makes it clear that the Commission could pay the reasonable litigation expenses of the Durham Petitioners without fear that the Comptroller General or the General Accounting Office would, in the course of an audit, declare such an expenditure improper. Under the circumstances, the Commission's claim that it nonetheless lacks the "authority" to make such a payment is wholly disingenuous.

Other petitioners.

B. The Commission Abused Its Discretion In Denying The Durham Petitioners' Request.

Since the Commission clearly is able to pay--without fear of reproach from the nation's chief accounting and auditing officer--the litigation expenses of the Durham Petitioners, the critical question on this appeal is whether it abused its discretion both in failing to do so, and in failing to seriously consider the matter at the Commission level.

Under the Comptroller's opinion in B-92288 (Addendum A, Durham Main Br. p. 7), the Commission is authorized to reimburse intervenors when "necessary to represent adequately opposing points of view on a matter." The Commission has not found that the Durham Petitioners' participation was unnecessary to the presentation of an opposing point of view. Indeed, the record is replete with a convincing demonstration that Durham's participation was the predominant factor in presenting the "opposing points of view" on the issue of route location. Both PASNY and the Commission Staff* wanted Route A--

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* In its Initial Brief to the Administrative Law Judge, the Staff, in comparing its proposed Route A-1, "with all the alternatives," claimed that its "route is found to be the most desirable from an environmental point of view" (Initial Br. 1/28/74, App. D. p. 6). (See also Exh. 7i (p. 179), R. 4565, et seq.).

through the Durham Valley and with their respective modifications--as the primary route for the Gilboa-Leeds line. It was only by the dint of the efforts of the Durham Petitioners; their bringing of highly qualified experts; and their amassing of documentary material, that the Administrative Law Judge and the Commission rejected Route A.

Significantly, the Commission concedes that the Durham Petitioners "made a case" on the question of the routing alternatives for the Gilboa-Leeds transmission line (FPC Br. p. 66, n. 17). Nonetheless, the Commission contends that while the Durham Petitioners concededly "made a case" on the question of the route ultimately selected, they failed to make a case "for an award" of their costs (Id.). The tortured distinction that the Commission thus invites is a logical nullity. To say, as the Commission now does (Br. p. 69), that it is "by no means clear" that Route A would not have been rejected by the decision makers without the input of the Durham Petitioners, is an affront to any reasonable review of the record.

If the Durham Petitioners had not put on their convincing and opposing case, who would have marshalled the evidence for the rejection of Route A? Surely not the Commission's Staff. And certainly not PASNY, since it too announced its preference for Route A (Tr. 225).

As noted at pages 20-23 of the Durham Petitioners' main brief, the Commission, PASNY and Administrative Law Judge Levy have all indicated that the role of the Durham Petitioners was critical in the final choice of route.

The Durham Petitioners contend, albeit immodestly, that but for their intervention in the Commission's proceedings, the historic ambiance of the Durham Valley and the ages-old Susquehanna Turnpike--a national landmark*--would today be despoiled and bisected by a clear-cut gouge, pocked with ugly stanchions supporting a power transmission line strung along the route originally supported--and fought for--by the Commission's Staff and PASNY. The Commission's suggestion that, had the Durham Petitioners not intervened, it nonetheless might have resolved to select a route other than that prefererred by its Staff and PASNY is egregious nonsense. Under any rational view of the facts, the Durham Petitioners' activities in this matter clearly bring them within the ambit of the Comptroller General's test.**

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* 41 Fed. Reg. 5987-88.

** On the Durham Petitioners' inability to finance this seven-year proceeding, the plain undisputed fact is that these Petitioners are impecunious. The Commission, neither at the hearing level or in this Court, controverts this fact (FPC Br. 72).

The Durham Petitioners provided the essential element--highly qualified environmental experts--in the hearings.

While the Durham Petitioners, of course, had their own interest in the outcome,* they also presented the opposing point of view, namely, the broad public interest in preventing a tragic despoliation of the Durham Valley. Furthermore, the Commission recently reported to Congress that the petitioner-intervenors in Greene County I effected a "major impact" upon the Commission in fulfilling its procedural and substantive responsibilities. Hearings on S. 2715 Before the Subcom. on Admin. Prac. and Pro. of the Senate Comm. on the Judiciary, 94th Cong., 2nd Sess. at 755 (1976).**

The interests that the Durham Petitioners served in this case go beyond the present generation of landholders, vacationers, tourists and sightseers. True to the purposes of NEPA, the work of the Durham Petitioners in protecting a very special scenic, historical and cultural

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* See the comments of Judge Mansfield in Greene County II quoted in the Durham Petitioners' main brief at p. 19.

** For a discussion of the importance of the role played by intervenors in Commissing proceedings, see generally House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 94th Cong., 2nd Sess., Report on Federal Regulation and Regulatory Reform, Ch. 10, at 409-412.

direction entirely

area from encroachments planned by PASNY and endorsed by the Commission's Staff was primarily in the interest of the future generations. It was arbitrary in the extreme for the Commission to disregard this contribution.

C. The Law Of The Case Doctrine Is Inapposite.

PASNY argues that this Court cannot review the fees and expenses issue because "the law of the case established by Greene County I" precludes such review (PASNY Br. pp. 4-5).

In Greene County I, the Court noted that "at this posture of the proceedings and under current circumstances" it would not order the Commission to pay Durham's fees and expenses (455 F.2d at 426). The Court also found that a "clearer congressional mandate" was lacking (Id.).

Since Greene County I, Congress, admittedly, has not passed legislation directly applicable to the Commission on the issue. However, the two opinions of the Comptroller General are ample authority for the Court to grant the relief the Durham Petitioners now seek. Moreover, the Court's statements in Greene County I, were directed to the then "current circumstances" and the then "posture of the proceedings."

The law of the case doctrine, whatever application it may have in other contexts, does not apply here since there was no final adjudication by this Court in Greene County I. Furthermore, as Judge Learned Hand aptly pointed out in Higgins v. California Prune & Apricot Grower, Inc., 3 F.2d 896, 898 (2d Cir. 1924):

> " . . . whatever may be said of earlier decisions, it is now well settled that the 'law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense." [see cases cited therein.]

Accord: Commercial Nat. Bank in Shreveport v. Connolly, 176 F.2d 1004, 1006 (5th Cir. 1949); Schaefer v. First Nat. Bank of Lincolnwood, 509 F.2d 1287, 1294 (7th Cir. 1975).

D. The Commission's Action Is Subject To Review.

PASNY's point that the Commission's exercise of its discretion is "not subject to judicial review" (PASNY Br. p. 11) is plainly wrong. Even the Commission does not advance this argument. Per contra, it contends that the refusal to award fees and expenses was supported by the record--not that the refusal is nonreviewable. Review under an abuse of discretion standard [5 U.S.C. § 706(2)(A)] involves two inquiries: (1) whether the agency acted within the scope of its authority; (2) whether "the

decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971).

Here, the Commission utterly failed to consider the relevant factors as noted in the Comptroller General's opinions; and there indeed has been a clear error of judgment. Moreover, as we have shown, the Commission's refusal to make the requisite fee and expenses award is not supported by "substantial evidence." Accordingly, the Commission's ruling is "unlawful" under 5 U.S.C. § 706(2)(E).

The Commission should be held accountable by this Court for its arbitrary and unsupportable action in this matter.

## CONCLUSION

For the foregoing reasons, the Commission's January 29, 1976 Order respecting expenses and fees should be set aside. The Court should grant the Durham Petitioners' petition for review and remand the case to the Commission, directing it to hold an evidentiary hearing on the reasonableness of the amounts sought by

the Durham Petitioners for reimbursement of expenses and attorneys' fees.

Respectfully submitted,

BARRY H. GARFINKEL
Attorney for Petitioners
Town of Durham and Association for the Preservation of Durham Valley
919 Third Avenue
New York, New York 10022
(212) 371-6000

Douglas M. Kraus

Of Counsel

October 22, 1976
New York, New York

UNITED STATES COURT OF APPEALS
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AFFIDAVIT OF SERVICE

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STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK)

MARILYN KOLINSKI, being duly sworn, deposes and says:

I have this day served two copies of the within Reply Brief For Petitioners Town Of Durham and Association For The Preservation Of Durham Valley on the following persons by depositing the same properly enclosed in a post-paid wrapper, in a depository regularly maintained by the United States Postal Service in New York County, New York addressed to their respective addresses:

Robert J. Kafin, Esq.
115 Maple Street
Glens Falls, New York 12801

Scott B. Lilly, Esq.
Power Authority of the State of New York
10 Columbus Circle
New York, New York 10019

Greene County's main brief). The Court may have [illegible]

Philip R. Telleen, Esq.
Federal Power Commission
Washington, D.C. 20426

Blitman and King
500 Chamber Building
351 South Warren Street
Syracuse, New York 13202

Marilyn Kolinski
MARILYN KOLINSKI

Sworn to before me this

22nd day of October, 1976.

John Virgil Marinelli

JOHN VIRGIL MARINELLI
Notary Public, State of New York
No. 60-2521765
Qualified in Westchester County
Commission Expires March 30, 1977